IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

FRANCISCO GARCIA, et al.

Plaintiff,

VS.

MICROSOFT CORPORATION,

Defendant.

CIVIL ACTION

FILE NO. 1:07-CV-2363 CC

PLAINTIFF'S MOTION TO REMAND AND INCORPORATED MEMORANDUM OF LAW IN SUPPORT THEREOF

NOW COMES FRANCISCO GARCIA (the "Plaintiff"), acting by and through undersigned counsel, and files this Motion to Remand, and hereby moves this Court to remand the above styled action to the Fulton County Superior Court pursuant to 28 U.S.C. 1447 as Microsoft Corporation (the "Defendant" or "Microsoft") has improperly removed this action from the aforementioned court.

Introduction

The Defendant removed this case from the Fulton County Superior Court (the original action was filed on August 23, 2007) on September 27, 2007 alleging, as its sole basis for removal, the Class Action Fairness Act of 2005 ("CAFA"). While Plaintiff concedes that he and the Defendant are of diverse citizenship, and that there is factual and legal commonality among the putative class members, the Defendant's removal was

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improper because the aggregate amount in controversy for this case does not satisfy the $5 million threshold required under CAFA, and arguably, the $75,000 individual threshold requirement of CAFA is also not met. Accordingly, Plaintiff now moves this Court to remand this action to Fulton County Superior Court.

ARGUMENT AND CITATION OF AUTHORITY

I. DEFENDANT'S REMOVAL WAS IMPROPER.

Federal courts are courts of limited jurisdiction,[1] and in order to remove a case based on CAFA in the 11th Circuit, the Defendant must prove, by a preponderance of the evidence, that (i) the aggregate amount in controversy for the purported class action exceeds $5,000,000, exclusive of costs and interest (see 28 U.S.C. § 1332(d)(2)); (ii) the number of class members in the proposed class exceeds 100 (see 28 U.S.C. § 1332(d)(5)(b)); and (iii) the claim of at least one member of the proposed class exceeds $75,000 (see Lowery v. Alabama Power Co., 483 F.3d 1184 ("We need not decide today whether the $75,000 provision might yet create an additional threshold requirement that the party bearing the burden of establishing the court's jurisdiction must establish at the outset, i.e., that the claims of at least one of the plaintiffs exceed $75,000") (11th Cir., 2007) and Abrego

[1] See Burns v. Windsor Ins. Co., 31 F.3d 1092, 1095 (11th Cir., 1994).

Abrego v. Dow Chemical Company, 443 F.3d 676 ("[W]e do conclude ... that the case cannot go forward unless there is at least one plaintiff whose claims can remain in federal court.") (9th Cir., 2006).

However, in the case at bar, the Defendant's unsupported assertions in its Notice of Removal concerning the aggregate amount of damages for the putative class, fail to meet the evidentiary burden imposed upon the Defendant by CAFA for this Court to exercise removal jurisdiction. Moreover, the Defendant's Notice of Removal is utterly silent on the second CAFA threshold of whether or not there is at least one potential class member whose claims exceed $75,000.

A. The Defendant Bears the Burden of Proof.

While removing defendants frequently argue that the Plaintiff bears some evidentiary burden on a motion to remand, the case law in the 11th Circuit now unequivocally states that the removing party bears the burden of demonstrating federal jurisdiction by a preponderance of the evidence. See Friedman v. New York Life Ins. Co., 410 F .3d 1350, 1353 (11th Cir.2005); Pacheco de Perez v. AT & T Co., 139 F.3d 1368, 1373 (11th Cir.1998). Moreover, the 11th Circuit recently reiterated that the removing party bears this burden even in the context of CAFA, despite legislative history to the contrary. See Lowery

v. Alabama Power Co., 483 F.3d 1184, 1208 (11th Cir.2007); Miedema v. Maytag Corp., 450 F.3d 1322, 1329-30 (11th Cir.2006) (Holding that "[g]eneralized appeals to CAFA's 'overriding purpose' are unavailing in the face of CAFA's silence on the traditional, well-established rules that govern the placement of the burden of proof and the resolution of doubts in favor of remand").

B. The Case Law Constrains the Universe of Evidence Available For Consideration on a Motion to Remand to the Complaint and the Notice of Removal.

Nevertheless, not only does the Defendant bear the burden of proof on a motion to remand, the scope of the inquiry into whether or not the Defendant has carried its burden must be limited to the pleadings before the Court- i.e., the Complaint and the removing document, the Notice of Removal - especially where the complaint, as is the case here, omits any explicit demand for damages. See Thrift Auto Repair, Inc. v. US Bancorp, 2007 WL 2788465 (Holding that "[w]hen the damages sought by a plaintiff are unspecified in the complaint, the removing party must establish that federal jurisdiction is appropriate by a preponderance of the evidence. Lowery, 483 F.3d at 1208. This is an odd rule to apply because, as discussed below, the Court is prohibited from considering any evidence. The Eleventh Circuit has acknowledged that "our precedent compels us to continue forcing this square peg into a round hole." Id. at 1211.) (N.D.Ga., 2007); and Lowery at 1210 ("[i]n assessing the propriety of removal, the court considers the document received by the defendant from the plaintiff - be it the initial complaint or a later received paper - and determines whether that document and the notice of removal unambiguously establish federal jurisdiction.").

C. The Complaint and the Notice of Removal Do Not Indicate that Any of the Putative Class Members Possess Individual Damages in Excess of $75,000.

While the case law in the 11th Circuit remains somewhat ambivalent in terms of the interpretation and applicability of CAFA's $75,000 individual threshold requirement, other circuits have unequivocally held that the first requirement for asserting federal removal jurisdiction under CAFA is that at least one member of the putative class have damages in excess of $75,000. See Abrego Abrego, 443 F.3d at 689.

Here, the evidence before the Court effectively precludes the Defendant from being able to show that any member of the putative class, all of whom are subscribers to the XBOX Live service and whose damages arise from their subscription to that service and the manner in which the subscription fees were collected, possess individual damages in excess of $75,000. In particular, the principle injury to each putative class member is approximately $49 a year (i.e., the yearly subscription fee for the XBOX Live service). See Plaintiff's Complaint at ¶ 8. Indeed, although the Plaintiff paid two years of subscription fees, he effectively only paid one subscription fee, as the second payment was ultimately refunded by the Defendant. In addition, because the Plaintiff was unaware of the pending withdrawal of the second subscription fee, his bank account was overdrawn, and he was assessed an overdraft fee of $35 for the withdrawal of the second payment. From these actual damages of approximately $84, it is virtually impossible for the Defendant to posit any logic or rubric, based solely on the facts from the Complaint and the Notice of Removal, wherein the damages for any putative class member, including Plaintiff, are in excess of $75000, exclusive of costs and interest.

D. The Amount in Controversy Aggregated Across the Putative Class Does not Exceed $5 Million.

In its Notice of Removal, the Defendant claims that the potential damages for the Plaintiff's putative class action exceed $5 million because the Defendant has received, for the life of the XBOX Live program in Georgia, more than $5,000,000 in subscription fees. See Notice of Removal at ¶ 10-11. Such bald and unsupported allegations have been routinely rejected by the Courts here in the 11th Circuit, and in particular in the post Lowery era.

First and foremost, it should be noted that the Defendant did not provide any actual evidence with its Notice of Removal, e.g., an affidavit, other than to make conclusory, self serving allegations. In Lowery, the Court of Appeals clearly rejected such allegations and deemed them insufficient to carry the CAFA evidentiary burden:

> "Moving to the merits, we hold that the defendants here are unable to meet their burden of establishing the requirements for federal jurisdiction over a mass action, because they are unable to establish that the plaintiffs' claims are potentially valued at more than $5,000,000. Tracking § 1446(b), we note that the defendants' notice of removal contained no document clearly indicating that the aggregate value of the plaintiffs' claims exceeds that amount and, as such, they are unable to establish federal jurisdiction by a preponderance of the evidence." Id. at 1212.

Moreover, as was the case in Lowery, the Plaintiff's Complaint does not indicate or even reasonably imply that the aggregate amount in controversy in this action exceeds $5,000,000.[2]

Nevertheless, even if the conclusive statements in the Defendant's Notice of Removal are somehow deemed "evidence" or

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[2] Here, the fact that the Complaint shows typical damages for each putative class member being around $84 looms large, in the sense that at $84 a person, with the Defendant alleging only that there were more than 100 class members, the aggregate

"facts", the "facts" still remain insufficient to carry the Defendant's burden of proof. Specifically, in the Thrift Auto Repair case, the Court holds that even where a defendant submits an affidavit from an employee stating facts relevant to the amount in controversy,[3] the proffered facts rarely coincide with the specifics of the purported class and tend to focus on aggregate figures unrelated to the putative class members at issue. Id. at 3 ("However, like the defendant's statement in Miedema which assumed that all ranges and ovens sold would be at issue (and not just the ones that were defective), the Defendants' affidavit is too sweeping in its calculations."). Here, as in the cases criticized by the Thrift Auto Repair court, the Defendant's sole basis for jurisdiction is the fact that it has received gross revenue in excess of $5,000,000 from Georgia subscribers to its XBOX Live service - wherein such contentions have been uniformly deemed insufficient to carry a CAFA evidentiary burden. Id. at 3.

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amount in controversy in this case, based on the Complaint and the Notice of Removal, is approximately $8400.

[3] It should be noted that, as a technical matter, facts not provided by the Plaintiff are not generally admissible in the remand analysis since such information not contemplated by §1446(b). See Thrift Auto Repair at 3. However, the matter is still considered here *arguendo*.

Conclusion

Because the Defendant has failed to demonstrate, by a preponderance of the evidence, that the amount in controversy in this case, on an individual basis, does not exceed the threshold value required for removal jurisdiction under CAFA nor the threshold value for the aggregated amount in controversy across the class under CAFA, the Defendant's removal of this action from the Fulton County Superior Court was improper. Accordingly, the matter should be immediately remanded to the Fulton County Superior Court.

Respectfully submitted, this 2nd day of October, 2007.

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CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing PLAINTIFF'S MOTION TO REMAND AND INCORPORATED MEMORANDUM OF LAW IN SUPPORT THEREOF and PLAINTIFF'S MOTION FOR ORAL ARGUMENT upon the Defendant and its counsel of record in this action by filing said documents in the CM/EF system.

Respectfully submitted, this 2nd day of October, 2007.

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